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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BARBARA R. SCHREIBER,

Petitioner,

– against –

BURLINGTON NORTHERN, INC., R-H HOLDINGS CORPORATION, and THE EL PASO COMPANY, TRAVIS HUBERT PETTY, WILLIAM V. HOLIK, JR., M.R. ENGLER, JR., W.C. HENDERSON, R.S. MORRIS, M.A. EHRLICK, A.M. DERRICK, RICHARD L. McCONN, D.J. MacIVER, JR. and L.M. VAREN KAMP, HOWARD BOYD, WILLARD F. ROCKWELL, JR., W.D. NOEL, L. EMORY KATZENBACH, BEN F. LOVE, KENNETH RUSH, J.R. HUBBARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S SUPPORTING BRIEF

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QUESTIONS PRESENTED

1. Does Section 14(e) of the Williams Act prohibit manipulative acts, even though the manipulator discloses those acts after they occur, at a time when it is too late to have the market freely react and for the victims of the wrongful acts to take corrective market action?

2. Did a manipulative act occur when the maker of a tender offer (i) for the sole purpose of protecting the target company insiders at the expense of tendering shareholders, wrongfully withdrew that offer, which had been opposed by the insiders, after it had been fully subscribed for, pursuant to an agreement between the maker and the target company insiders and (ii) immediately thereafter make a substituted tender offer on the same terms and conditions as the previous offer, allowing those insiders to tender their own target company shares while those who previously tendered all their

shares would now have those shares significantly reduced under the new offer?

3. Whether the remedies of those who tendered and were injured can be left to conflicting and inconsistent remedies of various states and whether any such remedy is not precluded?

TABLE OF CONTENTS

Page

Questions Presented..... (i)-(ii)

Table of Cases and Authorities. (v)-(ix)

Opinions Below..... 1

Jurisdiction..... 2

Constitutional And Statutory Provisions Involved..... 2

Statement of the Case..... 3

Reasons For Granting The Writ..... 8

CONCLUSION..... 31

Appendix A:

Third Circuit Opinion in Schreiber v. Burlington Northern, Inc., et al., ___ F.2d ____, Fed.Sec.L.Rep. (CCH) [Current Transfer Binder] ¶91,407 (3rd Cir. 1984)

District Court Opinion in Schreiber v. Burlington Northern, Inc., et al., 568 F.Supp. 197 (D.Del. 1983)

Appendix B:

Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl.2)

The Commerce Clause of the United States Constitution (U.S. Const. art. I, §8, cl. 3)

The Fourteenth Amendment of the United States Constitution (U.S. Const. amend. XIV)

Section 14(e) of the Williams Act, 15 U.S.C. 78n(e)

TABLE OF CASES

	Page
Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757 (2nd Cir. 1983), cert. denied, _____ U.S. _____, 104 S.Ct. 550 (1983)	9, 13, 21
Data Probe Acquisition Corp. v. Datatab, Inc., 722 F.2d 1 (2nd Cir. 1983) cert. den. _____, U.S. _____ (1984)	9, 13 14, 21
Edgar v. Mite Corp., 457 U.S. 624, 73 L.Ed. 2d 269 (1982)	13, 21, 29, 30
Ernst & Ernst v. Hochfelder, 425 U.S. 185, 47 L.Ed.2d 668, 96 S.Ct. 1375 (1976)	16, 17
Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories, et al., _____ U.S. _____, 74 L.Ed.2d 882 (1983)	16
Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981 cert. denied, 455 U.S. 982, 102 S.Ct. 1490 (1982)	9, 14 25
Pacific Realty Trust v. APC Investments, Inc., 685 F.2d 1083, (9th Cir. 1982)	9
Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 51 L.Ed.2d 124, 97 S.Ct. 926 (1977)	21, 22
Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 51 L.Ed.2d. 480, 97 S.Ct. 1292 (1977)	17

Schreiber v. Burlington Northern, Inc., et al., ___ F.2d ___, Fed.Sec.L.Rep. (CCH) [Current Transfer Binder] ¶91,407 (3rd Cir. 1984) — 2, Appendix A

Schreiber v. Burlington Northern, Inc., et al., 568 F.Supp. 197 (D.Del. 1983) — 1, 26, Appendix A

Tennessee Valley Authority v. Hill, 437 U.S. 153, 57 L.Ed.2d. 117 (1978) — 16

Constitutional Provisions

Commerce and Supremacy Clauses of the U.S. Constitution — 2, 26, 27, Appendix B

U.S. Constitution 14th Amendment — 3, 29, Appendix B

Statutes and Rules

Securities Exchange Act of 1934 §27 (15 U.S.C. §78aa) — 2, 18

Securities Exchange Act of 1934 §10(b)(15 U.S.C. §78j(b)) — 17, 19, 21, 22

The Williams Act §14(e) (15 U.S.C. 78n(e)) — 3, 9, 10, 12, 13, 14, 14, 17, 18, 20, 21, 22, 23, 26, 29, 31

Securities and Exchange Commission Rule 10b-5 (17 C.F.R. §240. 10b-5) — 15

Other Authorities

28 U.S.C. §1254(1) — 2

H.R. Rep. No. 1383, 73d Cong., 2d Sess. 7 (1934) — 18, 19, 20

A.B.A Subcommittee on Proxy Solicitations and Tender Offers, Federal Regulation of Securities Commmittee, State Takeover Statutes and the Williams Act, reprinted at 32 Bus.L. 186 (1976) — 30

H.Bloomenthal, Lock-Ups - Mobil Wins Battle; Loses War, 4 Securities & Federal Corporation Law Report 97 (1982) — 10

G.Brunelle, Using the Lock-Up to Defend Against a Hostile Tender Offer - When Is It Manipulative? 11 Securities Regulation Law Journal 76 (1973) — 10

R.DeLaMater, Target Defensive Tactics as Manipulative Under Section 14(e), 84 Columbia Law Review 228 (1984) — 10

S.Hochman, Marathon Revisited: A Review of the Post-Marathon Cases Involving Defensive Responses to Tender Offers Alleged to Be Manipulative Despite the Absence of Deception, 16 Review of Securities Regulations 923 (1983) — 10

M. Lowenstein, Section 14(e) of the Williams Act and the Rule 10b-5 Comparisons, 11 Georgetown Law Journal 1311 (1983) — 11

Prentice, Target Board Abuse of Defensive Tactics: Can Federal Law be Mobilized to Overcome the Business Judgment Rule? 8 Journal of Corporation Law 337 (1982) 11

R. Profusek, Tender Offer Manipulation: Tactics and Strategies After Marathon, 36 Southwestern Law Journal 975 (1982), reprinted in 25 Corporation Practice Comment 335 (1983) 11

L. Rachford, Takeover Developments - Defining Tender Offers and manipulation Under the Williams Act, 40 Washington and Lee Law Review 1199 (1983) 11

V. Rosenzweig, The Legality of Lock-ups and Other Responses of Directors to Hostile Takeover Bids or Stock Aggregations, 10 Securities Regulation Law Journal 291 (1983) 11

H. Silberberg and D.Pollack, Are the Courts Expanding the Meaning of Manipulation Under the Federal Securities Laws? 11 Securities Regulation Law Journal 265 (1983) 11

E. Weiss, Defensive Responses to Tender Offers and the Williams Act's Prohibition Against Manipulation, 35 Vanderbilt Law Review 1087 (1982) 11, 12, 22

Wilner and Landy, The Tender Trap: State Takeover Statutes And Their Constitutionality, 45 Fordham L.Rev.1 (1976) 30

Note, Target Defensive Tactics Under Section 14(e), 84 Columbia Law Review 228 (1984) 12

Note, Tender Offers, Lock-ups and The Williams Act: A Critical Analysis of Mobil Corp. v. Marathon Oil Co., 21 Duquesne Law Review 669 (1983) 12

Note, Section 14(e) of the Williams Act: Can There Be Manipulation With Full Disclosure Or Was The Mobil Court Running on Empty? 12 Hofstra Law Review 159 (1983) 12

Note, Securities: Lock-up Options Employed by Target Corporations as a Defensive Technique to Unwanted Takeovers, 58 Notre Dame Law 926 (1983) 12

Note, Tender Offeror's Right to Injunctive Relief Recognized, 3 Pace Law Review 711 (1983) 12

Note, The Future of Lock-ups After Mobil v. Marathon, 27 St. Louis University Law Journal 261 (1983) 12

Note, Hostile Tender Offers and Injunctive Relief for 14(e) Manipulation Claims Developments After Mobil Corp. v. Marathon Oil Co., 40 Washington and Lee Law Review 1175 (1983) 12

Note, Swallowing the Key to Lock-ups Options, 14 University of Toledo Law Review 1055 (1983) 12, 13

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OPINIONS BELOW

The decision of the United States District Court for the District of

Delaware is reported at 568 F.Supp. 197. The decision of the United States Court of Appeals for the Third Circuit, affirming said judgment, is not yet officially reported, but is reported in CCH Fed. Sec.L.Rep. [Current Transfer Binder] par. 91,407 (1984). The decisions of the Third Circuit and of the District Court are set forth in Appendix A.

JURISDICTION

This Petition for Certiorari is filed pursuant to 28 U.S.C. §1254(1). Federal jurisdiction was invoked in the United States District Court, under Section 27 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §78aa, and the principles of pendent jurisdiction. The decision and judgment of the District Court dismissing the complaint was timely appealed, to the Third Circuit. The Third Circuit affirmed on April 2, 1984.

Constitutional And Statutory Provisions Involved

The Commerce and Supremacy Clauses of the United States Constitution and the

Fourteenth Amendment of the United States Constitution and Section 14(e) of the Williams Act, are set forth in Appendix B.

STATEMENT OF THE CASE

This action arises out of a tender offer, its wrongful cancellation after it had been fully subscribed for, and the reissuance of a revised tender offer, identical with the prior offer, under circumstances and terms favoring target company management to the injury of the original tenderors. **

On December 21, 1982, defendant Burlington Northern, Inc. through its wholly owned subsidiary, R-H Holdings Corporation ("Burlington" hereinafter), made a hostile tender offer (the

**Respondents never answered the complaint; their motion to dismiss thus assumed the truth of its substantive allegations. Those allegations are the basis of the facts submitted herein and were the basis on which the Courts below acted.

"December tender offer") for 25.1 million shares of stock in El Paso Gas Company ("El Paso") for $24 per share ("the December offer") which, if accepted, would give them majority control of El Paso. The December offer, which provided certain "outs" by which it could be terminated (which the complaint claims were inapplicable at bar), had a deadline of December 30, 1983. On December 29, 1982, the plaintiff-appellant tendered her El Paso shares in response to the December tender offer; by the December 30, 1983 deadline, the December tender offer was fully subscribed and Burlington had majority control of El Paso.

The El Paso management had urged rejection of the December tender offer, asserting that the amount was inadequate; management made a number of defensive moves to resist the December tender offer, including commencing and losing one litigation and was about to lose another in the Delaware Chancery Court. However, after the December 30, 1982 deadline had passed and it was clear that Burlington had succeeded in its December tender offer and litigation had failed,

the El Paso management entered into private negotiations with Burlington. As a result of these negotiations, which were not disclosed at that time to the tenderors, the December tender offer was rescinded and cancelled and a revised offer submitted.

The revised tender offer (the "January offer") coming immediately after the cancelled December offer provided for a new tender offer in which Burlington would only have to acquire 21 million shares of El Paso's stock at $24 per share, rather than the 25.1 million shares in the December offer. Options to acquire additional El Paso stock were given to Burlington and El Paso stock was also sold to Burlington. The January offer, although it involved payment of the same price to the shareholders that the El Paso management had previously recommended be rejected as "inadequate", was now approved by that management.

A number of parties clearly benefitted from the cancellation and reissuance of the Burlington tender offer. Clearly Burlington benefitted,

because it acquired control of El Paso. El Paso management clearly benefitted by being able to tender their own El Paso shares which they previously had not done. Moreover, Burlington "locked up" El Paso since the accepted December offer blocked other offers and artificially impacted the market price since that price rose to meet the tender offer. By cancelling the December offer and immediately resubmitting the revised offer, bolstered by option and stock sales with a new short tender period, respondents made sure that no one else could intervene with a better offer and the market could not freely seek its own level.

The shareholders and investors in the marketplace who, in defiance of El Paso's management recommendations, had tendered their shares under the December offer before the December 30, 1982 proration deadline, were damaged by the manipulation of the tender offer; they were required to retender their shares along with all other El Paso shareholders in the January offer, and their shares

which previously had been fully tendered became subject to extensive proration because the January offer was for considerably fewer shares than the December offer. Moreover, the El Paso shareholders had no other place to sell their shares. During the interval when the first offer was accepted, no one else would make a tender offer. Then and now, the marketplace reflected the fact that Burlington controlled El Paso and the El Paso stock would sell for less than its true value.

The Courts below rejected petitioner's action because they found that respondents had made disclosure of their "wrongful" acts at or about the time of the second tender offer. The Third Circuit arrived at its conclusion, notwithstanding its comment

> Of special concern to us are Schreiber's averments that El Paso management breached its fiduciary duty to stockholders when it negotiated such self-serving arrangements as the golden parachutes. Nontheless, in the wake of Sante Fe's instruction that "once full and fair disclosure has occurred, the fairness of the

> transaction is at most a tangential concern of the statute, 430 U.S. at 477-78, we are constrained to hold, until Congress directs otherwise, that shareholders like Schreiber must rely on the remedies provided by state law. (Footnotes omitted.)

The Courts below concluded that Section 14(e) is a "disclosure" statute and nothing more.

Subsequent to petitioner's commencement of the instant litigation, actions were brought in the Delaware Chancery Court for breaches of contract and fiduciary duty against the same respondents. There, upon respondents' consent, the actions were certified ex-parte as class actions and without notice to class members. The existence of these suits -- as we will show below -- in no way affects petitioner's claims or this petition.

REASONS FOR GRANTING THE WRIT

1. This case affords this Court an opportunity to decide a question not previously ruled upon by this Court, and which has been the subject of division

among the Circuits and intense scholarly debate.

As noted above, the crux of Third Circuit holding is that Section 14(e) is directed to disclosure and nothing more. The Sixth Circuit, in Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981), cert. denied 455 U.S. 982, 102 S.Ct. 1490 (1982), held that the absence of deception is not a requirement of Section 14(e) in prohibitting manipulative acts in connection with a tender offer.

The Ninth Circuit, in Pacific Realty Trust v. APC Investments, Inc., 685 F.2d 1083, 1086 (9th Cir. 1982) adopted the Sixth Circuit's approach.

The Second Circuit, on the other hand, has stated, in Buffalo Forge Co. v. Ogden Corp. 717 F.2d 757 (2nd Cir. 1983), cert. denied, _____ U.S. _____ 104 S.Ct. 550 (1983) and Data Probe Acquisition Corp. v. Datatab, Inc., 722 F.2d 1 (2nd Cir. 1983), cert. denied, _____ U.S. _____ (1984), that Section 14(e) deals only with disclosure and to constitute a violation of that

section an element of deception must be present. The Third Circuit in the instant case has thus aligned itself with the Second Circuit, rather than with the Sixth and Ninth Circuits.

The question of whether Section 14(e) covers manipulative acts or requires deception and non-disclosure for its violations is of significant importance. Indeed, Section 14(e) and its full reach have often been the subject of significant scholarly debate. The following is only a partial list of such writings:

H.Bloomenthal, Lock-Ups - Mobil Wins Battle; Loses War, 4 Securities & Federal Corporation Law Report 97 (1982); G.Brunelle, Using the Lock-Up to Defend Against a Hostile Tender Offer - When Is It Manipulative?, 11 Securities Regulation Law Journal 76 (1973); R.DeLaMater, Target Defensive Tactics as Manipulative Under Section 14(e), 84 Columbia Law Review 228 (1984); S.Hochman, Marathon Revisited: A Review of the Post-Marathon Cases Involving Defensive Responses to Tender Offers

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Defensive Responses to Tender Offers and the Williams Act's Prohibition Against Manipulation, 35 Vanderbilt Law Review 1087 (1982); Note, Target Defensive Tactics Under Section 14(e), 84 Columbia Law Review 228 (1984); Note, Tender Offers, Lock-ups and The Williams Act: A critical Analysis of Mobil Corp. v. Marathon Oil Co., 21 Duquesne Law Review 669 (1983); Note, Section 14(e) of the Williams Act: Can There be Manipulation With Full Disclosure Or Was The Mobil Court Running on Empty? 12 Hofstra Law Review 159 (1983); Note, Securities: Lock-up Options Employed by Target Corporations as a Defensive Technique to Unwanted Takeovers, 58 Notre Dame Law 926 (1983); Note, Tender Offeror's Right to Injunctive Relief Recognized, 3 Pace Law Review 711 (1983); Note, The Future of Lock-ups After Mobil v. Marathon, 27 St. Louis University Law Journal 261 (1983); Note, Hostile Tender Offers and Injunctive Relief for 14(e) Manipulation Claims Developments After Mobil Corp. v. Marathon Oil Co., 40 Washington and Lee Law Review 1175 (1983); Note, Swallowing

the Key to Lock-ups Options, 14 University of Toledo Law Review 1055 (1983).

The financial news are replete daily with constant references of hostile tender offers. Involvements in hostile tender offers are costly. Bids must be analyzed, financing arranged, counsel retained and used, filings and challenges to filings prepared, and disputes with stockholders resolved, all of which require time, effort and money. Litigation frequently ensues. Thus, the issue at bar now clouded with uncertainty, depending in which Circuit the matter arises, impacts on all this activity and is therefore wide reaching.

This Court has already suggested, in Edgar v. Mite Corp., 457 U.S. 624, 73 L.Ed.2d 269 (1982) the need to clarify the reach of the Williams Act. While it is true that this Court declined certiorari in Datatab and Buffalo Forge, both those cases did not present the factual opportunity to deal with the question. In Buffalo Forge, supra, the suit involved the refusal of the victor

of a tender offer to permit the target company to comply with an option granted by prior management to a "white knight". In Data Probe supra, the allegedly improper option had been granted after a merger had been agreed to between the target and another, and before the "white knight" had made a tender offer.

Accordingly, it is respectfully submitted this case requires that certiorari be granted.

2. We respectfully submit that Section 14(e) prohibits manipulation without requiring an element of deception. In short, we submit that the rationale of the Sixth Circuit in Mobil Corp. v. Marathon Oil, supra, applies and is the appropriate rule.

Section 14(e) of the Williams Act provides:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any

> tender offer or request or invitation for tenders, or any solicitation of securities holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

The foregoing language clearly indicates two types of prohibitions: (i) deception and disclosure and (ii) manipulative acts and practices. The use of the conjunctive "or" as opposed to "and" following the directive "it shall be unlawful for any person", inescapably leads to the foregoing conclusion. That conclusion is underscored by the mandate that the Commission "prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive or manipulative" (emphasis supplied).

If Congress intended deception to be the sole prohibition, it would simply have placed a period after the words "fraudulent, deceptive...acts or practices". It would not have added the

disjunctive "or" and "the manipulative acts". This Court has always recognized that the plain language of the statute is to be obeyed and deferred to as opposed to some perceived intent or gloss based upon a belief as to Congressional desires. Thus, in Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199, fn.19, this Court stated:

> "To let general words draw nourishment from their purpose is one thing. To draw on some expressed spirit outside the bound of the normal meanings of words is quite another.... After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." Addison v. Holly Hill Fruit Products, Inc., 322 U.S., at 617-618, 88 L.Ed. 1488, 64 S.Ct. 1215, 153 A.L.R. 1007. See Frankfurter, Some Reflections on the Reading of Statutes, 47 Col.L.Rev. 527, 536-537 (1947).

Accord, Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories, et al., _____ U.S. _____, 74 L.Ed.2d 882 (1983); Tennessee Valley Authority v. Hill, 437 U.S. 153, 57 L.Ed.2d 117 (1978).

While this Court has never considered the question of manipulative acts in the Williams Act context, it has considered somewhat similar constructions for Section 10(b).

In Ernst & Ernst v. Hochfelder, 425 U.S. 185, 47 L.Ed.2d 668, 96 S.Ct. 1375 (1976), the Court established that the word "manipulative", as used in Rule 10b-5, referred to intentional or willful conduct rather than simple negligence. 425 U.S. at 199. In Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 51 L.Ed.2d 480, 97 S.Ct. 1292 (1977), the Court held that a breach of fiduciary duty, without deception, was not a violation of Rule 10b-5. However, the Court went on to say:

> It is also readily apparent that the conduct alleged in the complaint was not "manipulative" within the meaning of the statute.
>
> * * *
>
> No doubt Congress meant to prohibit the full range of ingenious devices that might be used to manipulate securities prices.

430 U.S. at 476-77 (emphasis added).

These cases indicate that a "manipulative act" is separate and independent from violations stemming from nondisclosure. Although manipulative practices may often include an element of deception, this Court has never held that, as with breaches of fiduciary duty, an element of deception is required.

The legislative history of the Williams Act is not inconsistent with the concept of prohibiting manipulative acts without the elements of deception. While specific Congressional statements can be found addressed to the questions of deception and disclosure, these statements do not preclude manipulation existing as a separate wrong. Otherwise, Congress would not have added the disjunctive "or" and then "manipulative acts". In fact, in its outline of the Securities Exchange Act's organization, the Committee on Interstate and Foreign Commerce stated:

> Tne chief provisions of the bill may be grouped under six headings: (a) control of credits; (b) control of manipulative practices; (c) provision of adequate and honest reports to securities holders by registered

> corporations; (d) control of unfair practices; and (e) control of exchanges and over-the-counter markets; (f) admininstration.

H.R. Rep. No. 1383, 73d Cong., 2d Sess. 7 (1934) (emphasis added). It is clear, therefore, that the Securities Exchange Act is directed at much wider purpose than mere disclosure. The House Reports discussing the bill refers to the multitude of abuses which the bill was intended to cure:

> To reach the causes of the "unnecessary, unwise, and destructive speculation" condemned by the President's [Franklin D. Roosevelt] message, this bill seeks to regulate the stock exchanges and the relationships of the investing public to corporations which invite publlic investment by listing on such exchanges.

H.R. Rep. No. 1383, supra, at page 2. If, indeed, there is any single overriding purpose evident from the legislative history of the Securities Exchange Act of 1934, it is the protection of the public investor. As President Roosevelt wrote to Congress during consideration of the Act in 1934:

> I therefore recommend to the Congress the enactment of legislation providing for the regulation by the Federal Government of the operations of exchanges dealing in securities and commodities for the protection of investors, for the safeguarding of values, and, so far as it may be possible, for the elimination of unnecessary, unwise, and destructive speculation.

Letter of President Franklin D. Roosevelt, H.R. Rep. No. 1383, supra, page 2. (Emphasis added.)

Nothing in the Williams Act history suggests that §14(e) was to be read inconsistently with the foregoing.

Similarly, it is plain that the Williams Act has as its overriding purpose the protection of investors:

> Congress was indeed committed to a policy of neutrality in contest for control, but its policy of even-handedness does not go either to the purpose of the legislation or to whether a private cause of action is implicit in the statute. Neutrality is, rather, but one characteristic of legislation directed toward a different purpose - the protection of investors. Indeed, the statements concerning the need for Congress to maintain a neutral posture in takeover attempts are contained in

> the section of the Senate Report entitled: "Protection of Investors." Taken in their totality, these statements confirm that what Congress had in mind was the protection of shareholders, the "pawn[s] in a form of industrial warfare."

Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 29-30, 51 L.Ed.2d 124, 97 S.Ct. 926 (1977).

This Court stated that the Williams Act is "intended to protect investors" and "avoid favoring either management or the takeover bidder". Edgar v. Mite Corp., supra, 457 U.S. at 633.

Based on the foregoing, we submit the Williams Act clearly prohibits manipulative acts or practices in the absence of deception in accordance with the statute's unambiguous language.

The Third Circuit in the instant case, as did the Second Circuit in the Datatab and Buffalo Forge cases, relied upon the analysis of Section 10(b) and the cases construing that section to justify the claim that Section 14(e) is limited to disclosure consideration. We

submit that such a disposition rests on a mistaken assumption that an analysis of Section 10(b) applies to Section 14(e).

Section 10(b) is directed to insuring informed investment decisions through a regulation of trading markets which would require disclosure and prohibiting deception and classic kinds of market manipulations. See, e.g., Weiss, Defensive Responses to Tender Offers and The William Act's Prohibition Against Manipulation, 35 Vanderbilt Law Review 1087, 1092 (1982). On the other hand, the William Act is addressed to the narrower and more specific problem of "protection of investors who are confronted by a cash tender offer". Piper v. Chris-Craft Industries, Inc., supra, 430 U.S., at 35.

Tender offer battles, even in the context of full disclosure, create extreme pressures and frequently involve tactics which distort and artificially effect the market and the investment decisions.

The Third Circuit's refusal to accept manipulative conduct -- without deception

-- as a separate wrong because it would ultimate require "that the federal courts supervise the substantive fairness of practially all tender offers..." poses the wrong issue. The case at bar and other manipulation cases do not concern fairness. They deal with the fact that the particular defendants have prevented a free market by various means.

In sum, we submit that the Williams Act is concerned with complete disclosure and a free market which can properly react to such disclosure. If defendants prevent the market from freely acting, not because they have offered an unfair price, but through other devices, it helps no investor to have complete disclosure. The investor has no place to go with the information.

The case at bar does not involve the mere revision or renegotiation of a pending tender offer; it does not involve a claim of mere breach of fiduciary duty. This is a case where the deadline for proration of the tender offer had passed, with the offer being fully subscribed. The Burlington tender offer

had run its course, and Burlington had won. The market price of El Paso stock duly reflected that. No one else would tender for El Paso. Those who had subscribed had no place else to go. It was only then, after the tender offer had become a "fait accompli" that the El Paso management entered into negotiations with Burlington. Thus, in effect, the El Paso management and Burlington were playing a "heads I win, tails you lose" scheme. El Paso rejected the December tender offer and resisted the takeover bid of Burlington. Obviously, if El Paso had succeeded in resisting the tender offer, no further negotiation would have ensured. But since they lost, El Paso management and Burlington simply entered into an agreement which manipulated the already fully subscribed tender to comport with their own personal interests. By doing so they substituted their own self-serving agreement for the one chosen by the tendering shareholders. Surely, the disclosure of El Paso's private agreement with Burlington <u>after</u> the fact cannot remedy

the injuries suffered by the shareholders who had tendered their shares in the December offer. The disclosure provisions of the security laws, meant to permit shareholders to make intelligent investment decisions, can be of no use when shareholders are faced with no alternative but to accede to management's will. The Sixth Circuit in <u>Mobil Corporation v. Marathon Oil Co.</u>, supra, observed the same discrepancy.

> It may be that the Marathon shareholders in this case have now been fully informed that their management granted USS the Yates Field option and the stock option. They may now understand fully how these options deter any tender offers higher than $125 per share. <u>Yet, they have had no real alternative to accepting the USS offer</u>, because Mobil's offer of $126 is conditional upon the invalidity of the options, and there is and could be no other comparable tender offer as long as the "lock-up" options remain in effect.

669 F.2d at 376-77. [Emphasis added.]

There is yet another reason that the decision of the Court below should not stand. In a "heads I win, tails you lose" scheme in which management can play

both sides of the field, the carefully balanced scales between management of the target firm, the tender offeror, and the shareholders and investors become weighted against the shareholders and investors. There is no longer any impetus for a tender offer to the target company shareholders to be carried out. Management and the offeror can simply wait it out to find out whether the hostile tender offer will succeed. If it does not, target company management is spared from making any actions; if the hostile tender offer does succeed, as here, then, <u>after the fact</u>, the target company management can approach the offeror with terms favorable both to themselves and to the offeror. There is no free market and no room for any other bids.

The District Court below maintained that, should defendants' actions be considered "manipulation" under Section 14(e), "then potential offerors and management of target companies would be subject to liability every time a tender offer is revised or negotiated." (Appendix B). That simply misconstrued

the thrust of the complaint. It is not contended that a tender offer, even the one at issue, can never be revised or withdrawn once made. Nor does plaintiff-appellant assert that every action which affects the marketplace is manipulative. What makes the facts of the instant action manipulative is that the cancellation and reissuance of Burlington's tender offer (i) occurred <u>after</u> the offer had run its course and been fully subscribed and become legally binding; and (ii) served no purpose other than enabling El Paso's management to protect themselves; (iii) enabled Burlington to continue its control; (iv) locked out competing bids and prevented the marketplace from functioning; all at the expense and to the injury of El Paso's shareholders and investors.

3. The Third Circuit referred to the existence of subsequently commenced state court actions (in Delaware Chancery) and no doubt respondents will also claim here that the subsequently commenced suits will provide all necessary relief. We disagree.

In the first place, the state court actions do not and cannot encompass the federal claims.

Secondly, it is clear from the conduct of those state cases that there is substantial, questions concerning collusion between the litigants. Thus, for example, class status has been voluntarily stipulated to ex-parte. No notice has been given to the members of the class who might wish to "opt out" or seek new class representation because the present putative representative is inadequate.

Thirdly, there are significant constitutional questions in permitting a state class action to encompass nationwide members, when the jurisdictional basis for the class suit is that the corporation or corporations involved are organized in Delaware but non-Delaware citizens having no Delaware contact are now members of the class without notice of its existence or an opportunity to opt out or otherwise participate and have their rights completely adjudicated. It is submitted

that such procedure violates the 14th Amendment of the United States Constitution.

Lastly, relegating the injured parties to state court actions allows each state to fashion inconsistent remedies and relief or no remedy. One state may permit respondents the alleged outs (which the complaint claims is not applicable), while other states may affix liability for an entirely different reason. Each state may have an entirely different measure of damage. Some states may have statutes which purport to regulate defendants' conduct. To allow such inconsistent state action to overlap the tender offer area covered by the Williams Act, leads to extraordinary burdens not only upon interstate commerce in securities transactions caused by tender offers, but an interference with the regulatory scheme encompassed by the Williams Act. Such a result is inconsistent with the thrust of this Court's holding in Edgar v. Mite Corp., supra, 457 U.S. 624, 73 L.Ed.2d 269. Furthermore, as the A.B.A Subcommittee on

Proxy Solicitations and Tender Offers observed:

> It is clear that the existing mottled pattern is at best confusing and may even create outright conflicts of regulatory patterns by multiple states asserting a right to regulate a given transaction. For example, a tender offer for shares of a Delaware corporation with its principal place of business in Ohio and substantial portions of its assets in both Ohio and Indiana might be subject to the takeover laws of all three states. The hearings which could be required in Ohio and Indiana could produce a delay in effectiveness that might collide with the Delaware requirement that the tender offer be made not less than twenty nor more than sixty days after delivery of a statement of intent to make the offer. Such conflicts also permit a regulatory gap in the prohibition of manipulative acts or practices or may even deter mutually beneficial tender offers.

A.B.A Subcommittee on Proxy Solicitations and Tender Offers, Federal Regulation of Securities Commmittee, State Takeover Statutes and the Williams Act, reprinted at 32 Bus.L. 186 (1976); Accord, Edgar v. Mite Corp., supra, 457 U.S. 624, 73 L.Ed.2d 269.

Without federal control over manipulative acts or practices, the free flow of market forces will also be restricted. See, e.g., Wilner and Landy, The Tender Trap: State Takeover Statutes And Their Constitutionality, 45 Fordham L.Rev.1 (1976).

To avoid the burden of the differing and inconsistent state treatment of a single tender offer and the disputes arising thereunder, the Williams Act should be given its full force and effect. It is only through this Act that the adverse impact on interstate commerce can be avoided. This Court should prohibit the regulation of manipulative acts or practices by the states and give full effect to the federal statute to regulate for the purpose it was designed.

The objectives of the Williams Act must be met via the statute Congress enacted to achieve such objectives with the need for uniformity in regulating manipulative and deceptive acts or practices never greater.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-1504

BARBARA SCHREIBER,

Appellant

v.

BURLINGTON NORTHERN, INC., R-H HOLDINGS CORPORATION and THE EL PASO COMPANY, TRAVIS HUBERT PETTY, WILLIAM V. HOLIK, JR., M. R. ENGLER, JR., W. C. HENDERSON, R. S. MORRIS, M. A. EHRLICH, A. M. DERRICK, RICHARD L. McCONN, D. J. MacIVER, JR. and L. M. VAREN KAMP, HOWARD BOYD, WILLIARD F. ROCKWELL, JR., W. D. NOEL, L. EMORY KATZENBACH, BEN F. LOVE, KENNETH RUSH, J. R. HUBBARD

On Appeal from the United States
District Court for the
District of Delaware
(C. A. No. 83-13)

Argued February 28, 1984

Before: ADAMS, SLOVITER, *Circuit Judges*,
and TEITELBAUM, *District Judge*•

(Opinion Filed April 2, 1984)

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• Hon. Hubert I. Teitelbaum, United States District Court for the Western District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

ADAMS, *Circuit Judge.*

Barbara Schreiber, a shareholder of El Paso Gas Company (El Paso), brought this action under § 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e) (1976) (the Williams Act) after she lost the opportunity to profit from a hostile tender offer by Burlington Northern, Inc. (Burlington)[1] when the offer was rescinded and a friendly but less lucrative offer was substituted. The district court dismissed her complaint, holding that she failed to state a claim for violation of § 14(e) because she alleged no injury resulting from deception. *Schreiber v. Burlington Northern, Inc.*, 568 F. Supp. 197, 201-04 (D. Del. 1983). While we are troubled by some of the conduct averred in the complaint, we agree with the district court that Schreiber's alleged injuries are not actionable under the Williams Act. Accordingly, we affirm.

I.

In late 1982, having purchased over one-half million shares of El Paso in the open market, Burlington decided to complete its takeover of El Paso by making a tender offer for 25.1 million shares at $24 per share (the December tender offer). Deeming the offer a hostile one, El Paso management countered with numerous defensive measures. But El Paso shareholders reacted favorably, fully subscribing to the offer by the December 30, 1982 deadline.

1. Burlington used a wholly owned subsidiary, R-H Holdings Corp., to execute the details of the takeover. In this opinion, Burlington and R-H will be referred to jointly as Burlington.

Burlington, however, never accepted those tendered shares. Instead, after negotiations with El Paso management, Burlington announced on January 10, 1983 the terms of a new and friendly takeover agreement. Pursuant to the new agreement, Burlington undertook to: (1) rescind the December tender offer; (2) substitute a new tender offer (the January tender offer) for only 21 million shares, at $24 per share; and (3) recognize "golden parachute"[2] contracts between El Paso and four of its officers. By February 8, more than 40 million shares were tendered in response to Burlington's January offer, and the take-over was completed.

For shareholders like Barbara Schreiber, who tendered in response to the December offer, Burlington's withdrawal of that offer proved costly. The January offer was greatly oversubscribed, and consequently those shareholders who re-tendered were subject to substantial proration. Seeking redress, Schreiber filed suit on behalf of herself and similarly situated shareholders, alleging that Burlington, El

2. So-called "golden parachutes" generally provide multi-year benefits to high level executives of a target company after a takeover if they are discharged without cause or downgraded by the new management. As described in the Schedule 14D-9 filed by El Paso with the Securities and Exchange Commission on January 12, 1983, the "employment agreements" with the four officers provided for their "continued employment with the Company in their current positions and at not less than their current salary levels" for periods of either three or five years. App. at S-29 to S-30. The Schedule 14D-9 also disclosed that El Paso's Deferred Compensation Plan had been amended "to provide that for the purposes of such Plan a participant shall be deemed to have retired at the instance of the Company if his duties as a director, officer or employee of the Company have been diminished or curtailed by the Company in any material respect." App. at S-29.

Paso, and members of the El Paso board violated § 14(e)'s prohibition of "fraudulent, deceptive, or manipulative acts or practices ... in connection with any tender offer." She claims that Burlington's willful breach of the December tender offer was a manipulative distortion of the market for El Paso stock. Schreiber also alleges that in the January offer Burlington failed to disclose the golden parachutes and the fact that El Paso management finally approved the takeover because of the favorable arrangements negotiated with Burlington. Plaintiff thus claims that this January nondisclosure was a deceptive act forbidden by § 14(e).

Ruling on defendants' motions under Fed. R. Civ. P. 12(b)(6), the district court held that neither of Schreiber's theories of recovery was legally sufficient and dismissed the suit on June 27, 1983. This appeal followed.

II.

Schreiber's first theory of recovery -- that Burlington engaged in manipulation when it cancelled the December tender offer -- seeks to convert an arguable breach of contract into a violation of the Williams Act. The district court rejected this effort, holding that § 14(e) proscribes only acts that artificially affect market price through deception.

The courts of appeals are divided as to whether deception is a necessary element of the manipulative acts prohibited by § 14(e). In the first appellate decision directly to address this point, the Sixth Circuit held in *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981), that an option granted by a target company to a friendly bidder in order to block a hostile takeover attempt -- a "lock-up" option -- is a manipulative act within the scope of § 14(e), despite the lack of any deception. Since *Mobil*, however, the

Second Circuit has twice rejected efforts by hostile bidders to use § 14(e) to attack arrangements similar to the lock-up option. *Data Probe Acquis'n. Corp. v. Datalab, Inc.*, 722 F.2d 1 (2d Cir. 1983); *Buffalo Forge Co. v. Ogden Corp.*, 717 F.2d 757 (2d Cir. 1983). Both *Data Probe* and *Buffalo Forge* hold that Williams Act manipulation must involve misrepresentation -- that is, the omission or misstatement of material facts.

We believe that the Second Circuit's position, requiring some form of misrepresentation, represents a more accurate view of the Williams Act. As the legislative history and subsequent judicial interpretation of the Williams Act make clear, § 14(e) was not intended to create a federal cause of action for all harms suffered because of the proffering or the withdrawal of tender offers. Rather, § 14(e) was enacted principally as a disclosure statute, designed to insure that fully-informed investors could intelligently decide how to respond to a tender offer.[3] Considered in light of this philosophy of disclosure, withdrawal of the December offer did not violate § 14(e) since Burlington disclosed to the shareholders and to the general public the acts that allegedly constitute a breach of contract. In the analogous context of SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1983), the Supreme Court has restricted the meaning of "manipulative device" to conduct "intended to mislead investors by artificially affecting

3. H.R. Rep. No. 1711, 90th Cong., 2d Sess. 11 (1968) (the Williams Act was "designed to make the relevant facts known so that shareholders have a fair opportunity to make their decisions"); S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967). *See* Edgar v. Mite Corp., 457 U.S. 624, 639 (1982); Piper v. Chris-Craft Industries, 430 U.S. 1, 31 (1977) (the Williams Act "was designed solely to get needed information to the investor"); Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975).

market activity." *Santa Fe Ind. v. Green*, 430 U.S. 462, 477 (1977); *see also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976). That narrow definition of manipulation reinforces our view that Burlington complied with § 14(e) by fully disclosing its withdrawal of the December offer.

Although we share the Sixth Circuit's concern about defensive strategies "expressly designed" to "artificially affect normal healthy market activity," *Mobil, supra*, 669 F.2d at 374, we decline to join that court's open-ended notion of manipulative acts. To be sure, in drafting § 14(e) Congress chose to prohibit not only "fraudulent" and "deceptive" acts or practices, but also the "manipulative" ones, and therefore arguably sought to reach a broader range of conduct than mere misrepresentation. *See Mobil, supra*, 669 F.2d at 376-77; *see also* Note, *Target Defensive Tactics as Manipulative Under Section 14(e)*, 84 Col. L. Rev. 228, 237-8 (1984). But if taken at face value, there is a danger that the *Mobil* holding would transform all decisions by bidders or by target management that affect a tender offer contest into "artificial" influences.[4] Absent a requirement of deception, the Williams Act

4. For scholarly criticism of the broad reach of the *Mobil* holding, *see, e.g.*, Prentice, Target Board Abuse of Defensive Tactics: Can Federal Law Be Mobilized to Overcome the Business Judgment Rule? 8 J. of Corp. Law. 337, 353-58; Profusek, Tender Offer Manipulation: Tactics and Strategies After Marathon, 36 Sw.L.J. 975, 991-95 (1982); Note, The Future of Lock-Ups After Mobil Corp. v. Marathon Oil, 27 St. Louis U.L.J. 261, 281-82 (1983); Note, "Lock-Up" Enjoined Under Section 14(e) of Securities Exchange Act, 12 Seton Hall L. Rev. 881, 891-95 (1982). *But see* Target Defensive Tactics, *supra*, 84 Col. L. Rev. at 252-62; Note, Section 14(e) of the Williams Act: Can There Be Manipulation with Full Disclosure or Was the Mobil Court Running on Empty?

would mandate that the federal courts supervise the substantive fairness of practically all tender offers. Mindful of the Supreme Court's instruction in *Santa Fe* that we should be reluctant to federalize state corporate law, 430 U.S. at 479, we reject *Mobil's* expansive view of § 14(e) and hold that deception is an essential element of a manipulative act.

Schreiber's second theory of recovery -- that Burlington failed to disclose the golden parachutes and the fact that such favors persuaded El Paso management to grant approval of the January offer -- does incorporate a claim of deception. As the district court correctly recognized, however, the alleged January nondisclosure was not causally linked to Schreiber's damages. The losses she sustained were the result of Burlington's decision to cancel the December offer, a decision unaffected by Burlington's alleged nondisclosure in the January offer. Even if Burlington had made full disclosure in the January offer, this information would have made no difference to shareholders like Schreiber, whose injury had already been caused by the December rescission. Lacking a causal link between the alleged misrepresentation and the injuries, Schreiber's second theory also fails.

III.

Our decision today by no means constitutes an endorsement of the conduct which the complaint attributes to the defendants. Of special concern to us are Schreiber's averments that El Paso management breached its fiduciary duty to stockholders when it negotiated such self-serving arrangements as the golden parachutes. Nonetheless, in the wake of *Sante Fe's* instruction that "once full and fair disclosure has occurred, the fairness of the transaction is at most a

tangential concern of the statute," 430 U.S. at 477-78, we are constrained to hold, until Congress directs otherwise, that shareholders like Schreiber must rely on the remedies provided by state law.

Accordingly, the judgment of the district court will be affirmed.

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5. Currently pending in the Delaware Court of Chancery is a certified class action on behalf of the same class that Schreiber seeks to represent here. Gilbert & Steiner v. The El Paso Co. and Burlington Northern Inc. (Del. Ch. Consol. Civ. Act. Nos. 7075 & 7079). The plaintiffs in that case assert under state law substantially the same claims for breach of contract and breach of fiduciary duty that Schreiber presses before us here.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES COURT

FOR THE DISTRICT OF DELAWARE

BARBARA SCHREIBER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 83-13
BURLINGTON NORTHERN INC.)		
R-H HOLDINGS CORPORATION)		
THE EL PASO COMPANY,	)	
TRAVIS HUBERT PETTY,	)	
WILLIAM V. HOLIK, JR.,	)	
M. R. ENGLER, JR., W.G.	)	
HENDERSON, R. S. MORRIS	)	
M. A. EHRILICH, A.M.	)	
DERRICK, RICHARD L.	)	
McCONN, D.J. MacIVER,	)	
JR., and L. M. VAREN	)	
KAMP,	)	
	)	
Defendants.	)	

Thomas D. Whittington, Jr. and Judith N. Renzulli of Wilson, Whittington & Aulgur, Wilmington, Del., Irving Bizar of Pincus Ohrenstein Bizar D'Alessandro & Solomon, New York, N.Y., of counsel, for plaintiff.

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Robert K. Payson and James F. Burnett of Potter, Anderson & Corroon, Wilmington, Del., Mudge, Rose, Guthrie & Alexander, New York, N.Y., Wachtell, Lipton, Rosen & Katz, New York, N.Y., of counsel, for defendants The El Paso Company and the El Paso Directors.

OPINION

Wilmington, Delaware
June 27, 1983

LATCHUM, Chief Judge.

The term "manipulation" as used in Section 14(e) of the Williams Act, 15 U.S.C. §78n(e), has defied precise definition. The Act itself does not delineate its scope nor has the Securities and Exchange Commission ("SEC") prescribed its exact meaning in its rules and regulations. Thus, the federal courts have been left to give meaning to the term on a case-by-case basis. A number of decisions, in an effort to explain its meaning within the context of the statute, have focused on the particular fact situations to which plaintiffs have sought to apply the Act. This Court must similarly approach the problem in the limited context of determining whether the alleged breach and withdrawal of a proposed tender offer constitutes a Section 14(e) manipulative violation.

Presently before the Court are defendants' motions to dismiss the amended complaint brought under Section 14(e) by the plaintiff, Barbara Schneider [sic], an El Paso Gas Company ("El Paso") stockholder. Plaintiff brings

this action seeking damages on her own behalf and on behalf of all other El Paso shareholders similarly situated against El Paso, El Paso's directors, Burlington Northern, Inc. ("Burlington"), and R-H Holdings Corporation ("R-H"), a wholly owned Burlington subsidiary.

FACTS

For the purposes of the present motions to dismiss, the Court must accept the allegations of the amended complaint as true. The allegations of the complaint may be summarized as follows: By December, 1982, R-H had acquired 537,800 of El Paso's shares in the open market. R-H then decided to make a tender offer for 25.1 million shares of El Paso, which constituted 51% of El Paso's common stock. On December 20, 1982, Burlington's chief executive officer informed El Paso's directors of its impending tender offer.

On December 21, 1982, R-H made its tender offer (the "December tender offer") for 25.1 million shares at $24 per share. The offer provided certain

"outs" for R-H by which it could terminate the offer:

> Notwithstanding any other provision of the Offer, the Purchaser shall not be required to accept for payment or pay for tendered Shares, or may terminate or amend the Offer ... if, at any time on or after December 17, 1982 and prior to the acceptance for payment of any such Shares ..., any of the following shall occur: ... if, in the sole judgment of the Purchaser, in any such case, regardless of the circumstance (including any action or inaction by the Purchaser) giving rise to any such condition, such condition makes it inadvisable to proceed with the Offer and/or with such purchase or payment.

(Docket Item ["D.I."] 24, at 4-5.)

On December 29, 1982, the plaintiff tendered her El Paso shares in response to the December offer and later that tender offer was fully subscribed. At first, El Paso's management decided to resist the December tender offer and began a number of defensive moves: it sued Burlington in the Delaware Court of Chancery and in the U.S. District Court for the Northern District of Texas; it

filed a Schedule 14D-9 with the SEC in which it threatened to dispose of its assets; it also announced the issuance of a new class of preferred stock[1] and amended its by-laws.

Thereafter, El Paso and Burlington entered into negotiations. As part of the negotiations, plaintiff alleges that the defendant directors of El Paso entered into special agreements with El Paso to provide them with "golden parachutes" in the form of extended employee benefits, allegedly worth millions of dollars, in the event El Paso should be taken over.

On January 10, 1983, the parties resolved this dispute and agreed to the following:

> (a) Defendants Burlington and R-H would rescind and cancel the December offer and instead, would tender a new offer ("January offer") seeking to acquire only 21,000,000 shares of El Paso stock at $24 cash net per share and would purchase an additional 4,166,667 shares directly from El Paso also at $24 net per share. In addition, Burlington was granted an option to purchase an additional 1,950,000 common shares of El Paso at $24 per share.
>
> (b) Burlington and R-H would recognize the "Golden Parachutes" of defendants Petty, Holik, Engler and Henderson and by their January Offer enable the individual defendants to tender their El Paso shares to Burlington, which had not been tendered pursuant to the December offer.

(D.I. 5, at 7-8.) The following day R-H commenced its second or January tender offer which sought only 21 million shares at the same $24 per share price. On February 8, 1983, R-H accepted 21 million shares for payment after more than 40 million shares had been tendered.

Thereafter, the plaintiff commenced this action alleging that defendants' conduct violated Section 14(e) of the Williams Act in the following manner:

---

[1] El Paso accomplished the issuance of a new class of preferred stock by "issuing a dividend upon its common

(Footnote continued from previous page)
stock, ... which had rights designed to inhibit business combinations and to change existing voting rights of El Paso's common stockholders." (D.I. 27, at 4.)

(a) The improper termination and withdrawal of the tender offer constituted a willful breach of the tender offer agreements entered into pursuant to the December offer between plaintiff and the other members of the class and defendants Burlington R-H and have caused loss and damage to the tendering plaintiff and class members in they they [sic] have been denied their contractual right to receive $24 per share net cash for each of their El Paso shares and said damage has occurred by reason of the conduct of defendants Burlington and R-H, as well as the wrongful interference by defendant El Paso and the individual defendants in said contractual arrangements.

(b) The January offer omits to inform the shareholders of El Paso of the Golden Parachutes granted by El Paso to defendants Petty, Holik, Engler and Henderson and that the individual defendant directors caused a cancellation of the prior tender offer to enable a tender of their own shares and was not for the benefit of the public shareholders of El Paso.

(D.I. 5, at 8-9.)[2]

Thus, plaintiff alleges that as a result of this activity she and the class members were damaged because they were deprived of the December tender offer price of $24 per share. Moreover, plaintiff contends that since she and the class members are required to retender their shares along with all other El Paso shareholders in the January offer, their shares which had been fully tendered in the December offer are now subject to extensive proration. Plaintiff therefore seeks damages for the alleged Section 14(e) violations and has moved the Court to certify this litigation as a class

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[2] There are also currently pending in the Delaware Court of Chancery three actions: Breitman v. Burlington Northern, Inc. C.A. No. 7075 (filed Jan. 19, 1983); Steiner v. Burlington Northern, Inc., C.A. No. 7079 (filed Jan. 17, 1983). The Gilbert case has been certified to proceed as a class action. (D.I. 24A, Ex. D.) These cases raise the issues of breach of contract, breach of fiduciary duties, tortious interference with contract and conspiracy. (D.I. 24A, Ex. A-D.)

action encompassing all El Paso shareholders who tendered their shares in response to the December offer. As previously indicated, all of the defendants have moved to dismiss the amended complaint under Fed.R.Civ.P. 12(b)(6). Specifically, defendants contend that the amended complaint fails to state a claim upon which relief can be granted because the willful breach of a tender offer contract or a tortious interference with such a contract are not violations of Section 14(e). In addition, defendants argue that the failure to disclose that El Paso granted "golden parachutes" to its directors and that these directors breached their fiduciary duties by causing the termination of the December tender offer are also not Section 14(e) violations because the failure to disclose a breach of fiduciary duty in tender offer materials is not a William Act violation.

The plaintiff counters by arguing that defendants' activity in terminating the December tender offer and initiating the January tender offer constituted a

manipulative practice in violation of Section 14(e) and relies upon the Sixth Circuit's recent decision in Mobil Corp. v. Marathon Oil Corp., 669 F.2d 366 (6th Cir. 1981), in support of that argument. The nondisclosure claims, plaintiff contends, are sufficiently pled to withstand a dismissal motion.

DISCUSSION

A. Manipulation Claim

The first question is whether the termination of the Decedmber tender offer and the initiation of the January tender offer amounted to manipulation within the meaning of that term in Section 14(e). We begin the analysis with the understanding that the basic purpose of the federal securities laws is to require "adequate disclosure." This concept had its origin in the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq., which was passed in response to the abuses that led to the 1929 stock market crash. As envisaged by Congress, the purpose of the securities laws. was to ensure that potential investors would have available

to them sufficient information to enable them to make a reasoned decision as to whether or not to engage in a particular securities transaction. Indeed, President Roosevelt wrote Congress during consideration of the Securities Exchange Act of 1934:

> There remains the fact, however, that outside the field of legitimate investment, naked speculation has been made far too alluring and far to easy for those who could and for those who could not afford to gamble.
>
> Such speculation has run the scale from the individual who has risked his pay envelop or his meager savings on a margin transaction involving stock with whose true value he was totally unfamiliar, to the pool of individuals or corporations with large resources, often not their own, which sought by manipulation to raise or depress market quotations far out of line with reason, all of this resulting in loss to the average investor, who is of necessity personally uninformed.

Letter of President Franklin D. Roosevelt, S. Rep. No. 792, 73d Cong., 2d Sess. 1-2 (1934).

Furthermore, encompassed with the concept of adequate disclosure was the belief that an investor should be protected from those who might deceive or manipulate; the fear being that clandestine activity would improperly influence the investor or the market in general. In this respect, the Fletcher Report of the Senate Banking and Currency Committee noted: "The true function of an exchange is to maintain an open market for securities, whose supply and demand may freely meet at prices uninfluenced by manipualtion or control." Stock Exchange Practice, Report of Senate Banking and Currency Committee, S. Rep. No. 1455, 73d Cong., 2d Sess. 30 (1934). Thus, any manipulative activity that would interfere with the normal functioning of supply and demand would be prohibited by the Securities Exchange Act. Illustative of manipulative activity at the time of the Act's passage was the use of pools, whereby a group would secretly agree to actively trade in a single security so as to raise its price and then the pool members would unload the securities at a profit to the unsuspecting public. The

Fletcher Report pointed out that, "the activity fomented by a pool creates a false and deceptive appearance of genuine demand for the security on the part of the purchasing public and attracts persons relying upon this misleading appearance to make purchases." Id. at 32 (emphasis added).

The basic philosophy under the 1934 Act was carried forward in the enactment of the Williams Act. During consideration of this legislation, its sponsor, Senator Harrison Williams, stated that the Act "provides for full disclosure in cash tender offers," 113 Cong. Rec. 24664 (1967)(statement of Sen. Williams), and that "[t]hrough this legislation people will have more information, and will be able to intelligently decide whether to accept a tender offer and sell their shares to a group which may wish to obtain a controlling interest." Id. at 24665. In particular, Senator Williams stated:

> The essential problem in transfers of control resulting from cash tender offers or open market or privately negotiated purchases is that persons seeking control in these ways

> are able to operate in alomost [sic] complete secrecy concerning their intentions, their commitments and even their identities. Since the competence and integrity of management and controlling persons are of vital importance to stockholders, secrecy in this essential area is inconsistent with the disclosure pattern generally prevailing in the American securities markets.

Id. at 855.

Thus, the underlying purpose of the Williams Act is the adequate disclosure of information to the shareholder "so that they can make informed investment decisions on the basis of the same facts known by the person making the tender." Id.

Those cases that have examined the purpose of the Williams Act have reaffirmed consistently that it is principally a disclosure statute. See Dan River, Inc. v. Icahn, [current] Fed. Sec. L. Rep. (CCH) ¶ 99,043, at 94,961 (4th Cir. 1983); Panter v. Marshall Field & Co., 646 F.2d 271, 282-83 (7th Cir.), cert. denied, 454 U.S. 1092 (1981); Whittaker Corp. v. Edgar, 535 F.Supp. 933, 947 (N.D. Ill. 1982); Martin

Marietta Corp. v. Bendix Corp., 549 F.Supp. 623, 627-29 (D.Md. 1982); Oklahoma Publishing Co. v. Standard Metals Corp., 541 F.Supp. 1109, 1112-13 (W.D.Okla. 1982); Merritt v. Colonial Foods, Inc., 499 F.Supp. 910, 913-14 (D.Del. 1980); Berman v. Gerber Products Co., 454 F.Supp. 1310, 1318 (W.D.Mich. 1978); In re Sushine Mining Co. Securities Litigation, 496 F.Supp. 9, 11 (S.D.N.Y. 1977). In fact, the Supreme Court has stated that the Williams Act "was designed solely to get needed information to the investor...." Piper v. Chris-Craft Indus., Inc. 430 U.S. 1, 30-31 (1977). See Rondeau v. Mosinee Paper Corp., 442 U.S. 49, 58 (1975).

Now that this Court has determined that the Williams Act is essentially a disclosure statute, it becomes necessary to determine how the term "manipulation" fits within this context.

In Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), the Supreme Court stated that manipulation is "intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of

securities." Id. at 199. Similalry, in Santa Fe Industries v. Green, 430 U.S. 462 (1977), the Court ruled that manipulation is activities "that are intended to mislead investors by artificially affecting market activity." Id. at 476.

Ernst & Ernst and Santa Fe both require an element of deception in order to be a manipulative violation. See Prentice, Target Board Abuse of Defensive Tactics: Can Federal Law Be Mobilized to Overcome the Business Judgment Rule?, 8 J. of Corp. Law 337, 354 (1983). The unfairness of a securities transaction, absent deception, the Santa Fe Court emphasized, is not the primary concern of the federal securities laws; rather, this is a concern of state law. 430 U.S. at 478-80.

Moreover, deception alone is not manipulation under Section 14(e). The manipulative activity must artificially affect the market price and do so in a misleading or deceptive manner. Manipulation essentially constitutes "artificial acts of stimulative trading designed to mislead investors into

believeing [sic] there was a heavy market demand for" the stock. Hundahl v. United Benefit Life Ins. Co., 465 F.Supp. 1349, 1363 (N.D.Tex. 1979).[3]

The fact, however, that a party's activity may affect market price cannot be the basis for a federal securities violation in the absence of deception. This was pointed out by Congress at the time the Securities Exchange Act was adopted:

> Any extensive purchases or sales are bound to cause changes in the market price of the security, but mere knowledge on the part of the purchaser or seller that his transaction will have this effect is not sufficient to bring him within the scope of this provision. Thus, if a person is merely trying to acquire a large block of stock for investment, or desires to dispose of a big holding, his knowledge that in doing so he will affect the market price does not suffice to make his actions unlawful.

S. Rep. No. 792, 73d Cong., 2d Sess. 17 (1934).

Thus, if the ordinary investor is able to reasonably point to a disclosed basis for the price change of a particular stock, there has not been manipulation under the Williams Act. It is when the activity in question is done in such a manner that the reason for the artificial change in price is undetectable by the ordinary investor that there is manipulation.

Applying the above analysis to the instant case, the Court finds that the

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3 Plaintiff has attempted to distinguish some of these cases by arguing that they are inapplicable because they are based on Rule 10b-5 instead of Section 14(e). This is a highly technical distinction. Except for the "in connection" requirement of Rule 10b-5, the two provisions are substantially the same. See, e.g., Smallwood v. Pearl Brewing Co., 489 F.2d 579, 605 (5th Cir.), cert. denied, 419 U.S. 873 (1974); Bucher v. Shumway, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,142, at 96,299 (S.D.N.Y. 1979), aff'd, 622 F.2d 572 (2d Cir.), cert. denied, 449 U.S. 841 (1980). In re Sunshine Mining Co. Securities Litig., [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,217, at 96,635-36 (S.D.N.Y. 1979).

amended complaint fails to state a claim for manipulation under Section 14(e) of the Williams Act. While it is true that the defendants' activities with respect to the tender offer did influence the price of the stock, the amended complaint fails to allege any deception by the defendants. All activity of the defendants that could have conceivably affected the price of the El Paso shares was done openly. If the Court were to hold that defendants' actions in terminating the December tender offer and initiating the January tender offer constituted manipulation under Section 14(e), then potential offerors and managment of target companies would be subject to liability every time a tender offer is revised or negotiated. Some latitude must be given in the application of the Williams Act for it was designed to enhance market activity through open supply and demand, not artificially restrain it.

As noted at the outset, plaintiff relies upon Mobil Corp. v. Marathon Oil Corp., 669 F.2d 366 (6th Cir. 1981), to support its contention that the

activities complained of here amounted to manipulation. In that case, Marathon was the target of Mobil's unfriendly tender offer. In resisting the tender offer, Marathon entered into an agreement with U.S. Steel which granted the latter an option to purchase one of Marathon's most valuable assets in the event U.S. Steel was unable to effectuate a successful tender of its own for Marathon. Id. at 367-68. The Court of Appeals for the Sixth Circuit held that the "lock-up" option given to U.S. Steel constituted a manipulative practice because it foreclosed bidding for the acquisition of Marathon.

The plaintiff argues that the activities complained of here are of a similar nature and the reasoning of Mobil should be followed. This Court disagrees. The Mobil decision is not the law of this Circuit, and it also appears to be an aberration in this field of the law.[4] As the commentators contend, and

[4] Legal commentators have soundly criticized Mobil. See, e.g., Prentice, Target Board Abuse of Defensive Tactics: Can Federal Law Be Mobilized to Overcome the Business Judgment Rule?, 8 J. of

this Court agrees, the Mobil decision is inconsistent with the rationale of the Santa Fe case. An analysis of the Williams Act shows that a key ingredient of a manipulative practice is deception, the direct opposite of disclosure, which the Santa Fe Court clearly pointed out. As that Court stated, "it repeatedly ... has described the 'fundamental purpose' of the Act as implementing a 'philosophy of full disclosure'; once full and fair disclosure has occurred, the fairness of the transaction is at most a tangential concern of the statute." 430 U.S. at 477-78.

The allegedly manipulative activity of withdrawing the December tender offer in violation of alleged contractual

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(Footnote continued from previous page.)
Corp. Law 337, 353-58; Profusek, Tender Offer Manipulation: Tactics and Strategies After Marathon, 36 Sw.L.J. 975, 991-95 (1982); Note, The Future of Lock-Ups After Mobil Corp. v. Marathon Oil, 27 St. Louis U.L.J. 261, 281-82 (1983); Note, "Lock-Up" Enjoined Under Section 14(e) of Securities Exchange Act, 12 Seton Hall L. Rev. 881, 891-95 (1982).

arrangements was disclosed to the shareholders and the general public. Because there was no deception practiced upon the shareholders in terminating their alleged contractual rignts, there was no manipulative violation within the meaning of Section 14(e) and defendants' motion to dismiss the manipulative claim will be granted.

B. Nondisclosure Claim

Plaintiff's second claim is that the nondisclosure of El Paso's grant of "golden parachutes" to its directors and the fact that these directors caused the withdrawal of the December tender offer and the initiation of the January offer for their personal gain constituted as Section 14(e) violation. Defendants contend that this so-called nondisclosure claim should likewise be dismissed.

Generally, the Williams Act requires the tender offeror to disclose material information to the shareholders of the target company. This Court, however, need not decide whether the alleged omissions are material, but even if they are, they are completely unrelated to the

damages alleged. Plaintiff avers that her damage was a result of the withdrawal of the Decmember tender offer. But even if the alleged undisclosed facts had been transmitted to the El Paso shareholders, it would have had no effect whatsoever upon the withdrawal of the December offer, because it was R-H's management and not El Paso's shareholders who withdrew the December offer.[5]

This action is analogous to two cases where plaintiffs alleged injury due to withdrawal of tender offers for their stock, Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981), and Lewis v. McGraw, 610 F.2d 192 (2d Cir.)(per curiam), cert. denied, 449 U.S. 951 (1980). In both cases, the plaintiffs sued under Section 14(e), contending that the tender offer materials contained misrepresentations. Both the Second and

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5 The defendants also argue that they properly disclosed this information and in any event they were under no obligation to do so. Because this Court has found sufficient grounds for dismissing this claim, it need not consider these arguments.

Seventh Circuits found in their respective cases that there was no Section 14(e) violation because the tender offers were withdrawn before the shareholders could rely upon them. Panter v. Marshall Field & Co., supra, 646 F.2d at 283-84; Lewis v. McGraw, supra, 619 F.2d at 195. Here the amended complaint fails to allege any causal nexus between the damage alleged by plaintiff -- that shareholders who tendered to the December offer could not fully participate in the January offer because of proration and were hence "deprived of the benefit of the $24 per share acquisition price originally proposed by defendants (D.I. 5, at 10) -- and the supposed omission of information in the January offer. Any failure to disclose the alleged breach of fiduciary duties by El Paso directors had absolutely no relevance to plaintiff's alleged damanges. Consequently, the Court will dismiss plaintiff's so-called nondisclosure claim.

C. Pendent State Claims

Plaintiff's amended complaint vaguely asserts that defendants' conduct in

addition to violating Section 14(e) also violated "the principles of common law." Because this Court has dismissed the Williams Act claims, the only ones conferring subject matter jurisdiction upon the Court, the pendent state claims for breach of contract and breach of fiduciary duty will also be dismissed. The Supreme Court in United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966), instructed: "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." To the same effect are: Walck v. American Stock Exchange, Inc., 687 F.2d 778, 792 (3d Cir. 1982); Tully v. Mott Supermarkets, Inc., 540 F.2d 187, 195-96 (3d Cir. 1976).[6]

CONCLUSION

This case is the perfect example of a plaintiff, who may have nonfrivolous

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[6] Because the Court has dismissed all the claims in the amended complaint, there is no need to rule on plaintiff's motion for class certification.

claims based on state law for breach of contract, tortious interference with contract, breach of fiduciary duties and perhaps even conspiracy, attempting to characterize those state law claims as violations of the federal securities laws. This ploy, however, has been foreclosed since Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977). In that case, the Supreme Court held that courts should be reluctant to federalize a substantial portion of corporate law traditionally left to state regulations. Accordingly, it will be the Delaware Chancery Court, in its pending action, which will appropriately decide those corporate law issues.

An order will be entered in accordance with this opinion.

IN THE UNITED STATES COURT
FOR THE DISTRICT OF DELAWARE

BARBARA SCHREIBER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 83-13
BURLINGTON NORTHERN INC.)		
R-H HOLDINGS CORPORATION)		
THE EL PASO COMPANY,	)	
TRAVIS HUBERT PETTY,	)	
WILLIAM V. HOLIK, JR.,	)	
M. R. ENGLER, JR., W.G.	)	
HENDERSON, R. S. MORRIS	)	
M. A. EHRILICH, A.M.	)	
DERRICK, RICHARD L.	)	
McCONN, D.J. MacIVER,	)	
JR., and L. M. VAREN	)	
KAMP,	)	
	)	
Defendants.	)	

ORDER

For the reasons set forth in the Court's Opinion entered in this case on this date, it is

ORDERED that the amended complaint is hereby dismissed.

Dated: June 27, 1983.

/s/
Chief Judge

APPENDIX B

APPENDIX B

The Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl.2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

The Commerce Clause of the United States Constitution (U.S. Const. art. I, §8, cl. 3):

> The Congress shall have Power...
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;...

* * *

The Fourteenth Amendment of the United States Constitution (U.S. Const. amend. XIV):

> Section 1. All persons born or naturalized in the United States, and subject to the jur-

isdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 14(e) of the Williams Act, 15 U.S.C. 78n(e):

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which there are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.